LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAR 13 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 827

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL UNION 1780, *et al.*,
Cross-Petitioners,

v.

PAN AMERICAN WORLD AIRWAYS, INC.,
Respondent.

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO CROSS-PETITION

JESSE FREIDIN
Attorney for Respondent
598 Madison Avenue
New York 22, New York

HERBERT PRASHKER
ERIC ROSENFELD
598 Madison Avenue
New York 22, New York
Of Counsel

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL UNION 1780, *et al.*,
Cross-Petitioners,
v.
PAN AMERICAN WORLD AIRWAYS, INC.,
Respondent.

No. 827

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO CROSS-PETITION

Statement

The instant cross-petition seeks certiorari to review an order issued by Judge O. D. Hamlin of the Court of Appeals for the Ninth Circuit on December 3, 1963. That order enjoined picketing and related activities by cross-petitioners, pending the filing and disposition of a petition in this Court by Respondent Pan American World Airways, Inc. ("Pan American") for certiorari to review a judgment of the Court of Appeals affirming an order of the District Court denying Pan American's motion for a preliminary

injunction. Pan American's petition for certiorari to review the Court of Appeals' judgment of affirmance is here as No. 725. Cross-petitioners seek review here of Judge Hamlin's order granting an injunction pending review of the judgment, only if this Court agrees to review that judgment by granting certiorari in No. 725 (Cross-Pet. pp. 2, 5, 6).

The Court of Appeals and the District Court agreed that the conduct enjoined by Judge Hamlin's order pending review by this Court was properly enjoinable as unlawful under the Railway Labor Act, 45 U. S. C. §§ 151-188 (1958), notwithstanding the Norris-LaGuardia Act, 29 U. S. C. §§ 101-115 (1958), *if* the Railway Labor Act is applicable to the employees involved in this case. The issue in No. 725 is whether or not the Railway Labor Act is applicable to those employees. The National Mediation Board has said that it is applicable. By the judgment rendered in No. 725, the Court of Appeals has said that the Railway Labor Act is not, and that the Norris-LaGuardia Act accordingly barred an injunction.

Judge Hamlin's order was made upon papers which established that failure to continue existing restraints would result in immediate and irreparable harm to advanced activities of the United States space program (Pet. No. 725, App. C, pp. 67a-77a). The order further recited that there was "good cause appearing for this order under Section 1651 of the Judicial Code, 28 U. S. C. § 1651, Rule 26 of the Rules of this Court, and the general equity powers of this Court" (Cross-Pet. p. 2a). Cross-petitioners do not challenge the existence of these bases for the order. Indeed, cross-petitioners nowhere clearly assert that the order constituted error.

Argument

The order is squarely in the line of decisions recognizing the power of the federal courts to issue status quo injunctions pending appellate review of their own determinations denying injunctions on Norris-LaGuardia Act grounds. *Texas & N. O. R. R.* v. *Brotherhood of Railroad Trainmen*, 307 F. 2d 151, 163-4 (5th Cir. 1962), *cert. denied*, 371 U. S. 952 (1963); *Norfolk & P. B. R. R.* v. *Brotherhood of Railroad Trainmen*, 248 F. 2d 34, 36 (4th Cir. 1957), *cert. denied*, 355 U. S. 914 (1958); *Chicago River & Indiana R. R.* v. *Brotherhood of Railroad Trainmen*, 229 F. 2d 926, 928 (7th Cir. 1956), *aff'd* 353 U. S. 30 (1957); *cf. Order of Railroad Telegraphers* v. *Chicago & N. W. R. R.*, 362 U. S. 330, 342 (1960); *Order of Railroad Telegraphers* v. *Duffy*, 358 U. S. 916 (1958) (denying motion for leave to file petition for writ of mandamus in this Court against the Judges of the Court of Appeals, Seventh Circuit, for refusing to dissolve an injunction pending appeal issued by the District Court under F. R. C. P. Rule 62 (c) following the District Court's refusal under the Norris-LaGuardia Act to issue a preliminary injunction); 28 U. S. C. § 1651.

This Court, in *United States* v. *United Mine Workers of America*, 330 U. S. 258 (1947), has stated the rationale behind Judge Hamlin's order and the line of cases it follows. There the District Court issued a temporary restraining order upon commencement of the action. Upon review of that order in subsequent contempt proceedings, this Court stated:

> "The memorandum in support of the restraining order seriously urged the inapplicability of the Norris-LaGuardia Act to the facts of this case, and the power of the District Court to grant the ancillary

> relief, depended in great part upon the resolution of this jurisdictional question. In these circumstances, the District Court unquestionably had the power to issue a restraining order for the purpose of preserving existing conditions pending a decision upon its own jurisdiction." (380 U. S. at 290).

We submit that there is no significant difference between a case in which a district court preserves existing conditions pending its own decision upon its own jurisdiction, and a case in which a court, as here, preserves existing conditions pending this Court's decision upon a district court's jurisdiction. Judge Hamlin's order was, in a word, clearly proper.

Cross-petitioners urge three reasons for granting the writ—"the conflict of decisions, the express reservation of a ruling by the Supreme Court in the *Railroad Telegraphers* case, and the obvious importance to the administration of Federal laws, of a final determination of the issue" (Cross-Pet. p. 5). We submit that none of these reasons is compelling.

(1). There *is* a conflict of decisions, because of the Seventh Circuit's decision in *Elgin, J. & E. Ry.* v. *Brotherhood of Railroad Trainmen*, 302 F. 2d 545 (7th Cir.), *cert. denied*, 371 U. S. 873 (1962). In that case, the Court of Appeals, by what appears to be circular reasoning, held (302 F. 2d at 548) that the Norris-LaGuardia Act prohibited a District Court from issuing an injunction pending appeal from an order which had refused an injunction on the ground of want of jurisdiction under the Norris-LaGuardia Act. In so deciding, however, the Court of Appeals deliberately deferred ruling itself on whether the Norris-LaGuardia Act truly deprived the District Court of jurisdiction to issue the original injunction prayed for. See *Elgin, J. & E. Ry.* v. *Brotherhood of Railroad Train-*

men, 302 F. 2d 540 (7th Cir.), decided the following day, *cert. denied*, 371 U. S. 873 (1962).

(2.) Cross-petitioners rely upon *Order of Railroad Telegraphers* v. *Chicago & N. W. R. R.*, 362 U. S. 330, 342 (1960), as furnishing a reason for granting the writ. We believe the case furnishes an affirmative reason for denying it, despite the conflict in the Courts of Appeals.

In that case, as here, this Court had before it the question of whether the Norris-LaGuardia Act barred an injunction, and the question of whether a court which had refused the injunction under the Norris-LaGuardia Act should have nevertheless issued an injunction pending appeal from its order. This Court held that the Norris-LaGuardia Act prohibited the injunction prayed for, but, with respect to the injunction pending appeal, said it was inadvisable to decide the issue "since we have determined the main controversy between the parties" (*ibid.*).

The issue presented by the instant cross-petition is likewise not the "main controversy," which is presented by the petition in No. 725. It would seem equally "inadvisable" in this case to decide the collateral issue of the propriety of the injunction pending appeal when the "main controversy" has been determined.

The cross-petition seeks certiorari only if certiorari is granted in No. 725—the "main controversy." If, having granted certiorari in No. 725, this Court affirms, the injunction pending appeal will lapse, and the issue presented by the cross-petition will stand in the same posture as the issue which the Court found "inadvisable" to decide in *Order of Railroad Telegraphers*, *supra*. If, on the other hand, the Court grants certiorari and reverses the Court of Appeals on the "main controversy," it should be likewise unnecessary or indavisable to decide the propriety of the injunction

pending appeal. For the reversal would confirm that the Norris-LaGuardia Act did not bar an injunction in the premises. Thus, granting the cross-petition will bring up for review a question which the Court will presumably find it "inadvisable" or unnecessary to decide.

(3) As to the importance of the issue to the administration of federal laws, cross-petitioners assert, without elaboration, that it is "obvious" (Cross-Pet. p. 5). If the petition in No. 725 is granted, however, the decision on the merits in that case will render decision on that issue unnecessary, or at least "inadvisable."

Conclusion

For the reasons stated, it is respectfully suggested that the cross-petition for a writ of certiorari should be denied.

Dated: New York, N. Y.
March 13, 1964.

Respectfully submitted,

JESSE FREIDIN
Attorney for Respondent
598 Madison Avenue
New York 22, New York

HERBERT PRASHKER
ERIC ROSENFELD
Of Counsel